



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Marc E. Elias, Esq.
Perkins Coie LLP
607 Fourteenth ST, NW
Washington, DC 20005-2011

APR 26 2010

RE: MUR 6021
John Kerry for President, Inc.
Kerry-Edwards 2004 Inc.
David Thorne, in his official
capacity as treasurer
John Kerry

Dear Mr. Elias:

On June 5, 2008, the Federal Election Commission notified your clients, John Kerry for President, Inc., Kerry-Edwards 2004 Inc. and David Thorne, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time. On October 20, 2008, the Commission notified your clients of a supplement to the initial complaint, and a copy of the supplement was forwarded to your clients at that time. On January 12, 2010, the Commission notified your clients of additional information from the complainant pertaining to the allegations in the complaint, and a copy of this additional information was forwarded to your clients at that time. On April 13, 2010, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe John Kerry for President, Inc., Kerry-Edwards 2004 Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 434(b). Additionally, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe that John Kerry violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations, and closed the file.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter at (202) 694-1650.

Sincerely,



Susan L. Lebeaux
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: John Kerry **MUR 6021**
Kerry for President 2004, Inc. and
David Thorne, in his official capacity as treasurer
Kerry-Edwards 2004, Inc. and
David Thorne, in his official capacity as treasurer

I. INTRODUCTION

The complaint in this matter alleges a concerted effort to deny ballot access in 2004 to Ralph Nader and Peter Miguel Camejo ("Nader-Camejo") by, and for the purpose of, benefiting John Kerry, Kerry for President 2004, Inc. and Kerry-Edwards 2004, Inc. (collectively "the Kerry Committee"), in which the Democratic National Committee ("DNC"); at least fifty-three law firms and ninety-five lawyers; and more than twenty-six other organizations and individuals allegedly participated. The complaint is 575 pages long, with 100 pages of allegations and 475 pages of exhibits, supplemented by a 100-page 2008 Presentment by a Pennsylvania state grand jury that charges a former Pennsylvania state representative, a former Pennsylvania House Minority Whip, and ten staffers who worked for the former Pennsylvania state representative and for the Pennsylvania House Democratic Caucus, with a "concerted plan to use taxpayer funds, employees, and resources for political campaign purposes" between 2004 and 2007.

The complaint is only one of several actions the complainant has initiated alleging violations of law stemming from an alleged concerted action to keep Nader-Camejo off the 2004 Presidential ballot in several states. Starting in 2007, Mr. Nader made the same factual allegations in separate federal lawsuits. See *Nader v. Democratic Nat'l Comm.*, 590 F.Supp.2d 164 (D.D.C. 2008); *Nader v. Democratic Nat'l Comm.*, 555 F.Supp.2d 137 (D.D.C. 2008); and *Nader v. McAuliffe*, 549 F.Supp.2d 760 (E.D. Va. 2008). In the lawsuits, Nader based his claims on abuse of process, malicious prosecution, conspiracy to abuse process and malicious

1 prosecution, violation of his constitutional right to run for federal office and his supporters'
2 constitutional rights to vote for him under 42 U.S.C. § 1983, and conspiracy to violate 42 U.S.C.
3 § 1983. The district courts dismissed these cases on various grounds, including failure to state a
4 claim, lack of subject matter jurisdiction, constitutional grounds, and *res judicata*. See *Nader v.*
5 *Democratic Nat'l Comm.*, 555 F.Supp.2d 137 (D.D.C. May 27, 2008); *Nader v. Democratic*
6 *Nat'l Comm.*, 590 F.Supp.2d 164 (D.D.C. December 22, 2008); and *Nader v. McAuliffe*, 593
7 F.Supp.2d 95 (D.D.C. January 7, 2009). Recently, the U.S. Court of Appeals for the D.C. Circuit
8 affirmed the dismissal of one of Nader's complaints on the grounds that he filed suit outside the
9 statute of limitations. *Nader v. Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir. June 9,
10 2009), and denied Mr. Nader's petition for an *en banc* reconsideration of that outcome. *Nader v.*
11 *Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir. July 28, 2009). Nader did not appeal the
12 dismissal of the other two complaints.

13 In the present matter, according to the complaint, the alleged concerted effort to benefit
14 the Kerry Committee resulted in several violations of the Federal Election Campaign Act of
15 1971, as amended (the "Act"). First, the complaint alleges that incorporated law firms provided
16 uncompensated legal services and resources while still paying firm attorneys, the value of which
17 constituted an undisclosed prohibited corporate in-kind contribution to the Kerry Committee, in
18 violation of 2 U.S.C. §§ 434(b) and 441b ("Count 1"). Second, the complaint alleges that the
19 Kerry Committee received, and failed to disclose, prohibited or excessive contributions in
20 connection with the Service Employees International Union ("SEIU") and America Coming
21 Together ("ACT") efforts to deny Nader-Camejo ballot access in Oregon, in violation of 2
22 U.S.C. §§ 441(b) and 441a(f) ("Count 2").

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As discussed in more detail below, Count 1's allegation is general and not supported by specific facts and therefore fails to provide reason to believe that a violation of the Act occurred and open an investigation into whether corporate law firms made prohibited in-kind contributions to the Kerry Committee that the Kerry Committee failed to report. As to Count 2, this allegation, as a whole, also fails to provide reason to believe a violation occurred, and thus insufficient grounds to investigate. In addition, while the activity at issue occurred in 2004, the complaint was not filed until 2008. Thus, among other reasons, the age of the alleged violations would create problems of proof and raise obstacles under the five-year statute of limitations. Therefore, the Commission found no reason to believe that John Kerry violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations. The Commission also found no reason to believe that Kerry for President 2004, Inc., and David Thorne, in his official capacity as treasurer, and Kerry-Edwards 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441b.

II. FACTUAL AND LEGAL ANALYSIS

A. Count 1: Alleged Undisclosed Corporate Contributions

1. Facts

The Complaint maintains that in order to help the Kerry Committee win the election in 2004, "Respondents" filed 24 complaints and/or intervened in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states, and they coordinated their efforts with the Kerry Committee, the DNC, and at least 18 state or local Democratic Parties. Complaint at 2-3. At least fifty-three law firms (and ninety-five lawyers nationwide) allegedly provided legal services for this effort. *Id.* at 6. Since, according to the complaint, the "vast majority of these law firms are incorporated," the value of legal services they provided free

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1 of charge while compensating the firms' attorneys constituted undisclosed prohibited in-kind
2 contributions to the Kerry Committee. Complaint at pp. 5-6. Paragraphs 24-73, 75-77, 79-86,
3 88-93, 97-108, and 287 of the complaint name law firms and attorneys participating in ballot
4 challenges. Paragraph 287 alleges that the Reed Smith law firm allegedly donated 18 attorneys
5 to the Pennsylvania lawsuit and billed their time to "charity," without charging any clients.

6 In support, the complaint alleges that a Section 527 organization, the Ballot Project,
7 worked "in conjunction with" the Kerry Committee, and that its president reportedly stated that
8 "[w]e're doing everything we can to facilitate lawyers in over 20 states," and estimated that \$2
9 million in free legal services had been received. Complaint at 51. The complaint further alleges
10 that four attorneys "affiliated" with Lawyers for Kerry, a voter monitoring project through which
11 attorneys volunteered their time and services at polling stations, represented parties in the ballot
12 challenge lawsuits. According to the complaint, the Lawyers for Kerry sign-up form on the
13 Kerry Committee website stated that "We may provide your contact information to the [DNC]
14 for ballot protection efforts," thus "providing further confirmation of direct coordination between
15 the Kerry" Committee, "and the lawyers involved in the ballot access litigation." *Id.* at 50;
16 Exhibit 30. In addition, the complaint relies on e-mails that allegedly show that the Kerry
17 Committee staff assisted ballot challenge lawsuits. *Id.* at 7-8, 48-49. In response to the
18 complaint, the Kerry Committee denied the allegations in Count 1, and requested that the
19 Commission dismiss the complaint.

20 **2. Analysis**

21 **a. Alleged Donation of Legal Services by Corporate Law Firms**

22 The Act prohibits corporations from making any "contribution." 2 U.S.C. § 441(b)(a). The Act
23 defines "contribution" as the provision of something of value "for the purpose of influencing any

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1 election for Federal office.” 2 U.S.C. § 431(8)(A)(i). A “contribution” includes the “payment by
2 any person of compensation for the personal services of another person which are rendered to a
3 political committee without charge for any purpose.” 2 U.S.C. § 431(8)(A)(ii). The Act
4 specifies that legal services rendered to or on behalf of an authorized committee of a candidate
5 are neither a contribution nor an expenditure “if the person paying for such services is the regular
6 employer of the individual rendering such services and if such services are solely for the purpose
7 of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26.” 2 U.S.C. §§
8 431(8)(B)(viii)(II) and (9)(B)(vii)(II); 11 C.F.R. §§ 100.86 and 146. Further, the value of
9 services provided without compensation by any individual who volunteers on behalf of a
10 candidate or political committee is not a contribution or an expenditure. 11 C.F.R. §§ 100.74
11 and 100.111 (“volunteer exemption”).

12 First, even assuming that some of the fifty-three law firms and ninety-five attorneys
13 named in Paragraphs 24-73, 75-77, 79-86, 88-93, 97-108, and 287 of the complaint assisted in
14 legal challenges free of charge to the Democratic state and local parties and individuals who filed
15 the ballot challenges, the complaint does not specify, with one exception, which firms allegedly
16 provided free services or to whom, which of those firms are incorporated, and of those, which
17 firms compensated their attorneys who worked on the ballot challenges. Without such
18 information, and given that any free attorney services may have been provided by volunteers
19 without any sponsorship from their employer, there is no reason to believe a violation of the Act
20 occurred, and therefore insufficient grounds to investigate the 2004 activities and billing
21 practices of the fifty-three law firms and ninety-five attorneys.

22 As for the only law firm specifically alleged to have provided free services to benefit the
23 Kerry Committee, the information in the complaint is contradictory. Specifically, the allegation

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1 is that the Reed Smith law firm reportedly billed its costs for the Pennsylvania ballot challenge to
2 "charity, without charging any client." That allegation is based on an October 1, 2004, article in
3 the *American Lawyer*. Complaint at 50, Paragraph 287 and Exhibit 41. However, in response to
4 claims asserted in that article and another press report that attorneys worked on the ballot
5 challenges free of charge for the non-partisan purpose of ensuring ballot integrity, the complaint
6 also alleges that the DNC's disclosure reports show that it paid Reed Smith \$136,142 in
7 "political consulting" and "legal consulting" fees in October and November 2004. See Paragraph
8 286. The contradictory allegations in the complaint as to whether Reed Smith was paid for its
9 work and the lack of specific facts in the complaint indicating that the law firm paid its attorneys
10 for their work on the ballot petition charges, as opposed to those attorneys having volunteered
11 their time without compensation, render the only specific allegation in Count 1 insufficient to
12 create a reason to believe a violation of the Act occurred and to warrant an investigation.

13 Even if there were corporate law firms that provided free services to ballot challengers
14 while compensating their attorneys, the complaint does not present facts sufficient to support that
15 those services constituted undisclosed in-kind contributions accepted or received by the Kerry
16 Committee. Merely alleging that the Ballot Project worked "in conjunction with" the Kerry
17 Committee, without supporting facts suggesting that the Ballot Project's efforts were on behalf
18 of the Kerry Committee or other indicia of concerted activity, does not provide a reason to
19 believe a violation of the Act occurred, and thus fails to provide sufficient grounds to investigate.
20 This is particularly so, where, as here, the allegation has been specifically refuted and there is no
21 information to the contrary.

22 **b. "Lawyers for Kerry"**

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Similarly, the fact that attorneys “affiliated” with Lawyers for Kerry, a voter monitoring project through which attorneys volunteered their time and services at polling stations on election day, may have also represented parties in the ballot challenge lawsuits, and that the Lawyers for Kerry sign-up form on the Kerry Committee website stated that “[w]e may provide your contact information to the [DNC] for ballot protection efforts,” do not adequately tie the Kerry Committee to any effort to procure or receive undisclosed free legal services from corporate law firms. Indeed, the term “ballot protection efforts” is consistent with the stated aim of Lawyers for Kerry, which was focused on ensuring that voters—particularly Kerry voters—would be able to cast their votes on election day, not the challenging of ballot petitions. See Mark Donald, *Answering the Call: Texas Democratic Lawyers Join Effort to Protect the Vote*, Texas Lawyer, October 18, 2004. The website language, without more, cannot be extrapolated into evidence that the Kerry Committee was involved in an effort to obtain free corporate legal services in order to prevent Nader from being placed on the ballot. That some attorneys who were involved in Lawyers for Kerry may also have worked on ballot petition challenges does not, without more, lead to an inference that the Kerry Committee may have received prohibited in-kind contributions, as the available information does not indicate that the lawyers in question received compensation from corporate law firms for working on the ballot challenges, and if so, that the Kerry Committee had any direct connection to those lawyers’ activities.

c. Other Allegations

Likewise, the other information included in the complaint does not give rise to a reason to believe that a violation of the Act occurred as to Count 1, and therefore does not warrant an investigation. Exhibit 7 of the complaint includes an e-mail communication from Caroline Adler, who is described as a DNC and Kerry Committee employee, to DNC employees who

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1 helped prepare challenges to Nader-Camejo's nomination papers. The e-mail, with the subject
2 entitled "DNC's Anti-Nader phone script," includes an attachment entitled "Script for Nader
3 Petition Signers," which DNC employees allegedly used as a guideline when calling to talk to
4 people who signed Nader-Camejo's petitions. Exhibit 9 includes an e-mail from Judy Reardon,
5 the Kerry Committee's deputy national director for Northern New England. According to the
6 complaint, this e-mail indicates that Ms. Reardon herself drafted one of the complaints against
7 Nader-Camejo and coordinated with the state Democratic Party officials and attorneys who filed
8 it. Martha Van Oot, an attorney who represented parties attempting to deny Nader-Camejo ballot
9 access in New Hampshire, replies "Great job, Judy," with her own hand-written revisions
10 attached. New Hampshire Democratic Party Chair and DNC official Kathleen Sullivan, who
11 filed the complaint, was copied on this exchange.

12 In its response, the Kerry Committee states that the allegation that it accepted prohibited
13 corporate contributions in the form of legal services is "false," and that it had every right to pay
14 staffers who engaged in ballot access litigation and to use unlimited volunteer attorneys. Kerry
15 Committee Response at 6-7. It asserts that its "limited involvement in ballot access litigation and
16 its awareness of the litigation engaged in by others—both on a volunteer and paid basis—simply
17 does not constitute a violation of the Act." *Id.* at 8. Further, it states that the complaint does not
18 point to any specific facts indicating that attorney volunteers were compensated in any way for
19 their volunteer work. *Id.* at 7. There is no information to the contrary.

20 Complainant maintains in his cover letter to the supplement that the 2008 Pennsylvania
21 Grand Jury Presentment supports his allegations that unnamed "Respondents" specifically
22 intended to benefit "the Kerry Committee by challenging the Nader-Camejo Pennsylvania ballot
23 petitions," and that unnamed "Respondents" made undisclosed contributions to the Kerry

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1 Committee. However, the Presentment does not contain facts supporting alleged undisclosed
2 prohibited corporate contributions by law firms to the Kerry Committee. The Presentment states
3 at page 55, as an introduction to the description of an alleged scheme to have state employees
4 work on the Nader challenge at taxpayer expense, that “[i]t was generally assumed, in
5 Democratic circles, that Nader’s appearance on the ballot would be detrimental to Democratic
6 Presidential Candidate John Kerry, since Nader would siphon votes from Kerry.” From this
7 statement, the supplement purportedly derives support for the complaint’s allegations that
8 unnamed “Respondents specifically intended to benefit” the Kerry Committee and “made
9 unlawful and unreported contributions to” it. Supplement at 10. Moreover, complainant asserts
10 that a law firm, not named in the Presentment, which was involved in the Pennsylvania Nader
11 challenge was “retained by or received payment from the Respondents who orchestrated
12 Respondents’ nationwide effort to deny ballot access to Nader-Camejo” to support “the inference
13 that Respondents’ related conduct in 17 other states was likewise intended to benefit” the Kerry
14 Committee, and that the law firm made a contribution to the Kerry Committee. *Id.* at 10-12.¹
15 However, the Presentment makes no findings as to the Kerry Committee or the law firm, and
16 does not link any of the activities charged to any activities or knowledge of the Kerry
17 Committee. Therefore, it adds no support to complainant’s allegations in Count 1.

18 **d. Conclusion**

19 The Commission has stated that “unwarranted legal conclusions from asserted facts or
20 mere speculation will not be accepted as true,” and “[s]uch purely speculative charges, especially

¹ Although acknowledging that the Presentment does not name the law firm, the complainant states that there is “little doubt” that Reed Smith was the law firm that filed the challenge to the Nader-Camejo 2004 Pennsylvania nomination papers. Cover letter to Supplement at 12. The cover letter to the supplement goes on to acknowledge that the Presentment also does not specifically state that the attorneys who filed the Pennsylvania charge knew it was prepared using funds and resources misappropriated from the taxpayers, but then asserts that the Presentment suggested they knew or should have known. *Id.* Even if that were so, that suggestion does not constitute a FECA violation.

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1 when accompanied by a direct refutation, do not form an adequate basis to find reason to believe
2 that a violation of the FECA has occurred.” See Statement of Reasons, MUR 4960 (Hillary
3 Rodham Clinton for Senate Exploratory Committee, issued December 21, 2000) (citations
4 omitted). Here, without specific facts suggesting that (1) attorneys from corporate law firms
5 assisting in Nader ballot challenges were compensated by their firms for this work, and (2) even
6 if they were, that the Kerry Committee played a role in this activity, rather than just being the
7 indirect beneficiary, there is nothing left but speculative charges that have been directly refuted,
8 providing an insufficient basis to find reason to believe that a violation of the Act occurred, and
9 therefore an insufficient basis for an investigation.

10 Accordingly, the Commission has determined to find no reason to believe that John Kerry
11 violated the Federal Election Campaign Act of 1971, as amended, or the Commission’s
12 regulations. The Commission has also determined to find no reason to believe that Kerry for
13 President 2004, Inc., and David Thorne, in his official capacity as treasurer, and Kerry-Edwards
14 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b)
15 and 441b(a) by accepting, and failing to disclose, prohibited contributions from corporate law
16 firms.

17 **B. Count 2: Allegations Relating to the Activities of ACT and SEIU**

18 **1. Factual Background**

19 Count 2 of the complaint alleges that the ACT and SEIU’s efforts to prevent Nader-
20 Camejo from being placed on the ballot in the State of Oregon, resulted in prohibited and
21 undisclosed contributions and expenditures to the Kerry Committee. Complaint at 93. In
22 support, the complaint refers to an August 16, 2004, blog entry from ACT employee William
23 Gillis, who stated that ACT shared the Portland, Oregon, office space with political campaign

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1 staff from SEIU, and that he witnessed “higher echelons of both staffs” organize “a concerted
2 effort among the ACT/SEIU staff to attack the Nader petition drive,” by signing petitions where
3 petitioners were required to sign, and then scratching out the signatures, thereby invalidating the
4 entire petition. Complaint at 74.

5 **2. Analysis**

6 The Act prohibits labor organizations like SEIU from making contributions to any
7 candidate, campaign committee, or political party or organization in connection with any election
8 to federal election. 2 U.S.C. § 441b. In 2004, the Act also limited contributions by entities like
9 SEIU’s PAC to any candidate or his or her authorized political committee with respect to any
10 election for federal office, which, in the aggregate, exceeded \$5,000. 2 U.S.C.
11 § 441a(2)(A) (2004).

12 The allegations in Count 2 of the complaint are insufficient, as the complaint does not
13 allege, and the available information does not suggest, that SEIU’s and ACT’s activities in
14 Oregon were coordinated with the Kerry Committee. Further, the complaint’s allegation that
15 ACT and SEIU shared facilities and organized “an attack” on the Nader petition drive similarly
16 provides no link between such factual allegations and the Kerry Committee.

17 Accordingly, the Commission has determined to find no reason to believe Kerry for
18 President 2004, Inc., and David Thorne, in his official capacity as treasurer, and Kerry-Edwards
19 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b and
20 441a(f) in connection with Count 2.

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